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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

Cumis Insurance Society, Inc.,)
 Plaintiff,)
 v.)
Government Employees Credit)
Union, Chester H. Dorman,)
Jerry M. Graybill, John T.)
Lancaster, R. N. Trapnell,)
Barbara J. Wood, J. T. Glass,)
Boone E. Kemp, O. L. Ponder,)
H. H. Willms, and)
Doris Dees Bolton,)
 Defendants.)

Civil Action No.
A-82-CA-13

**GOVERNMENT EMPLOYEES CREDIT UNION'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
TO CUMIS INSURANCE SOCIETY, INC.**

The defendant, Government Employees Credit Union ("GECU"), by counsel, pursuant to Rule 34 of the Federal Rules of Civil Procedure, requests Production of all documents in the possession, custody or control of the Plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), which are responsive to the numbered paragraphs below. CUMIS shall specify which documents are produced in response to each of the numbered paragraphs.

If any document herein requested was formerly in the possession, custody or control of CUMIS and has been lost or destroyed, CUMIS is requested to submit in lieu of each such document a written statement which (A) describes in detail the nature of the document and its contents; (B) identifies the person who prepared or authored the document and, if applicable, the person to whom the document was sent; (C) specifies the date on which the document was prepared or transmitted or both; (D) specifies, if possible, the date on which the document was lost or destroyed, and,

if destroyed, the conditions of or reasons for such destruction and the persons requesting and performing the destruction.

If any document otherwise required to be produced by this request are withheld, CUMIS shall identify the document by stating its date, author, recipients, and the reasons for withholding it.

This request for production of documents is continuing and any document obtained or located subsequent to production which would have been produced had it been available or its existence known at the time production was made is to be supplied forthwith.

Documents are to be produced at the offices of Rinehart & Nugent, 1040 American Bank Tower, 221 West Sixth Street, Austin, Texas 78701.

DEFINITIONS

A. "Document" means any and all types of recorded information, including, but not limited to, writings, drawings, graphs, charts, photographs, phono-records, film, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.

B. "CUMIS" means CUMIS Insurance Society, Inc., all directors, officers, employees, and agents thereof, and all persons acting or purporting to act on behalf of CUMIS Insurance Society, Inc.

C. "GECU" means Government Employees Credit Union, all directors, officers, employees, and agents thereof, and all persons acting or purporting to act on behalf of Government Employees Credit Union.

D. "The Complaint" means the Complaint filed herein by CUMIS Insurance Society, Inc. against Government Employees Credit Union and others on or about January 12, 1982.

E. "And" means and/or; "or" means and/or.

DOCUMENTS REQUESTED

1. All documents identified in response to GECU's First Interrogatories to CUMIS.

2. All documents which interpret, construe, describe, reflect, refer to or relate to insuring clause A of CUMIS' credit union discovery bond or any similar provision of any bond or policy.

3. All documents which interpret, construe, describe, reflect, refer to or relate to insuring clause B of CUMIS' credit union discovery bond or any similar provision of any bond or policy.

4. All documents which interpret, construe, describe, reflect, refer to or relate to exclusion (b) of CUMIS' credit union discovery bond or any similar provision of any bond or policy.

5. All documents which interpret, construe, describe, reflect, refer to or relate to exclusion (h) of CUMIS' credit union discovery bond or any similar provision of any bond or policy.

6. All documents which interpret, construe, describe, reflect, refer to or relate to the term "property" as used in CUMIS' credit union discovery bond or any similar provision of any bond or policy.

7. All documents which interpret, construe, describe, reflect, refer to or relate to the term "employees" as used in CUMIS' credit union discovery bond or any similar provision of any bond or policy.

8. All documents which interpret, construe, describe, reflect, refer to or relate to General Conditions 2 of CUMIS' credit union discovery bond or the notice, proof of claim and suit deadline provisions of any similar bond or policy.

9. All documents which interpret, construe, describe, reflect, refer to or relate to the following provision of the Directors and Officers Liability Policy: "Any loss paid under the CUMIS Credit Union Discovery Bond, under faithful

performance coverage, for which an officer or director would be liable and which liability would also be covered by the terms of this endorsement, the Society agrees to waive its right of subrogation under the CUMIS Credit Union Discovery Bond relative to such loss payment."

10. All documents which interpret, construe, describe, reflect, refer to or relate to insuring clause 1 of CUMIS' Directors and Officers Liability Policy or any similar provision of any bond or policy.

11. All documents which interpret, construe, describe, reflect, refer to or relate to the term "loss" as used in CUMIS' Directors and Officers Liability Policy or any similar provision of any bond or policy.

12. All documents which interpret, construe, describe, reflect, refer to or relate to the term "wrongful act" as used in CUMIS' Directors and Officers Liability Policy or any similar provision of any bond or policy.

13. All documents which interpret, construe, describe, reflect, refer to or relate to exclusion (h) of CUMIS' Directors and Officers Liability Policy or any similar provision of any bond or policy.

14. All documents which interpret, construe, describe, reflect, refer to or relate to Loss Provisions (a) of CUMIS' Directors and Officers Liability Policy or any similar provision of any bond or Policy.

15. All documents which interpret, construe, describe, reflect, refer to or relate to loss provision (b) of CUMIS' Directors and Officers Liability Policy or any similar provision of any bond or Policy.

16. All documents which explain, describe, reflect, refer to or relate to any changes in the terminology of any of the provisions referred to in paragraphs 1 through 15 above.

17. The original and all non-identical copies of the letter from Thomas J. Amiss ("Amiss") to CUMIS, dated February 15, 1980, which is referred to in paragraph 6 of the Complaint.

18. All documents which reflect, refer to or relate to the telephone call referred to in paragraph 7 of the Complaint.

19. All non-identical copies of the letter from CUMIS to Amiss, dated March 21, 1980, which is referred to in paragraph 8 of the Complaint.

20. The original and all non-identical copies of the materials sent to CUMIS by GECU which are referred to in paragraph 8 of the Complaint.

21. The original and all non-identical copies of the letter from M. R. Carlson to CUMIS, dated September 24, 1980, which is referred to in paragraph 9 of the Complaint.

22. All non-identical copies of the letter from John A. Benedict to GECU, dated October 7, 1980, which is referred to in paragraph 10 of the Complaint.

23. The original and all non-identical copies of the letter from Everette G. Allen, Jr., received by CUMIS on May 12, 1981, and all attachments thereto, which are referred to in paragraph 11 of the Complaint.

24. All non-identical copies of the letter from CUMIS to Everette G. Allen, Jr., dated May 20, 1981, which is referred to in paragraph 13 of the Complaint.

25. The originals and all non-identical copies of the letters from George Patton to CUMIS, dated May 13 and 18, 1981, and all attachments thereto or enclosures therewith, which are referred to in paragraph 16 of the Complaint.

26. All non-identical copies of the letter from CUMIS, dated June 8, 1981, which is referred to in paragraph 18 of the Complaint.

27. All documents which contain, reflect, refer to or relate to GECU or Bond No. CDB 08059 or any prior or similar bond or policy.

28. All documents which reflect, refer to or relate to correspondence or communication of any kind between or among any of the following persons: CUMIS, GECU, Chester H. Dorman, Jerry M. Graybill, John T. Lancaster,

R. N. Trapnell, Barbara J. Wood, J. T. Glass, Boone E. Kemp, O. L. Ponder, H. H. Willms, Doris Dees Bolton, James D. Bohn, E. G. Vorwerk, George E. Patton and/or Robert C. Howell.

29. All documents which reflect, refer to or relate to any claim made by any credit union against CUMIS which claim involved allegations of any of the following:

a. Failure of an officer to well and faithfully perform her or his duties;

b. Unauthorized expenditure of credit union funds by an officer, director or employee other than for personal financial gain;

c. Unauthorized, illegal or otherwise improper investment of credit union funds;

d. Investment in Government National Mortgage Association securities.

30. All documents which reflect, refer to or relate to any claim made against a director of any credit union, which claim involved allegations of any of the following:

a. Failure by such director to supervise officers or employees of the credit union;

b. Failure by such director to properly manage the funds or affairs of the credit union;

c. Negligence by such director;

d. Breach by such director of her or his duties to the credit union.

e. Government National Mortgage Association securities.

31. All documents which reflect, refer to or relate to claims made against a director of any credit union by the credit union itself or derivatively on behalf of the credit union.

32. All documents which reflect, refer to or relate to: (1) approval of CUMIS' credit union discovery bond or CUMIS' Directors and Officers Liability Policy and (2) any correspondence or communication concerning said bond and policy between CUMIS and the Board of Insurance of the State of Texas, including anyone acting or purporting to act on behalf of said Board of Insurance.

33. All documents which reflect, refer to or relate to the matters asserted in paragraphs 17, 21, 28, 31, 32, 33, 34, 35, 36, 37, and 38 of the Complaint herein.

34. All documents which reflect, refer to or relate rating or re-rating of or premiums on Bond No. CDB 08059.

Respectfully submitted,

Jerry Nugent
Robert C. Bass, Jr.
Rinehart & Nugent
1040 American Bank Tower
221 West Sixth Street
Austin, Texas 78701
(512) 476-6527

By

Everette G. Allen, Jr.
Linda L. Royster
Hirschler, Fleischer, Weinberg,
Cox & Allen
629 E. Main Street
P.O. Box 1 Q
Richmond, Virginia 23202
(804) 771-9538

Attorneys for Government
Employees Credit Union

CERTIFICATE OF SERVICE

I certify that I caused to be mailed, postage prepaid, the foregoing Interrogatories to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox and Stradley, 1500 RepublicBank Tower, Dallas, Texas 75201, this 2nd day of February, 1982.

.....

FILED

March 8, 1982

Charles W. Wagner, Clerk

By Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

Cumis Insurance Society, Inc.,)
vs.)
Government Employees Credit)
Union, Chester H. Dorman,)
Jerry M. Graybill, John T.)
Lancaster, R. N. Trapnell,)
Barbara J. Wood, J. T. Glass,)
Boone E. Kemp, O. L. Ponder,)
H. H. Willms, and)
Doris Dees Bolton.)

**Civil Action No.
A-82-CA-13**

**RESPONSE TO GOVERNMENT EMPLOYEES CREDIT
UNION'S FIRST REQUEST FOR PRODUCTION OF
DOCUMENTS TO CUMIS INSURANCE SOCIETY, INC.**

Cumis Insurance Society, Inc. files this its response to the Request for Production of Documents of Government Employees Credit Union, ("GECU"). In regard to the documents which Cumis will voluntarily produce, copies will be produced by delivery of same to the offices of the counsel of GECU at the expense of GECU. To the extent GECU desires production of original documents, same will be produced where located in Cumis' offices in Madison, Wisconsin.

1. No documents so identified.
2. Cumis objects to Request Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 for the reason that:

a. The requests are overly broad as they request the production of virtually each and every writing in the possession of Cumis which in any manner discusses the coverages in question. To gather for production every such writing in Cumis' possession is unduly burdensome and would cause great inconvenience and expense to Cumis in that virtually every claim file involving an unfaithfulness claim or an officer's and director's claim would need to be reviewed. In view of the questionable relevance of the materials, as discussed below, Cumis should not be required to incur such burden and expense.

b. The requests are overly broad in that they are unlimited in time.

c. The requests seek the production of privileged matters. A great deal of the documents requested are opinions of lawyers (both outside and in-house lawyers). Such documents are privileged by the attorney-client privilege and are not discoverable.

d. A good deal of the documents requested were prepared in anticipation of litigation by Cumis' representatives, lawyers, consultants and agents and contain mental impressions, conclusions, opinions and legal theories. Thus, such documents are not discoverable unless GECU has substantial need of the materials in the preparation of its case and GECU is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

e. Perhaps most importantly, a majority of the documents requested are not relevant to the subject matter involved in the action and will not lead to the discovery of admissible evidence. For example, documents which might "refer to" Insuring Clause A in a file relating to a claim based upon facts wholly distinguishable from this claim would in no way be relevant to this cause of action. Further, documents which merely "refer to" the other bond and policy provisions set forth in the requests

will be irrelevant and immaterial to this case. Further, the documents requested contain confidential information relating to other credit unions to which Cumis owes a duty to prevent the disclosure of same. Cumis would show that the questionable relevancy of these documents is particularly important in view of the burden and expense of providing same.

f. Alternatively, to the extent the documents requested must be produced, Cumis objects to the demand that they be produced in Austin, Texas. Because the documents requested will be voluminous, to the extent they must be produced, such production should be in Cumis' office where the documents are located.

3. Cumis will produce the documents requested in Request No. 17.

4. Cumis will produce the documents requested in Request No. 18.

5. Cumis will produce the documents requested in Request No. 19.

6. Cumis will produce the documents requested in Request No. 20.

7. Cumis will produce the documents requested in Request No. 21.

8. Cumis will produce the documents requested in Request No. 22.

9. Cumis will produce the documents requested in Request No. 23.

10. Cumis will produce the documents requested in Request No. 24.

11. Cumis will produce the documents requested in Request No. 25.

12. Cumis will produce the documents requested in Request No. 26.

13. To the extent that Request No. 27 requests documents prepared by attorneys (both outside and in-house), such documents are privileged by the attorney-client privilege and are not discoverable. Further, all documents requested that were prepared in anticipation of this litigation by Cumis or its representatives, attorneys, consultants and agents are not discoverable unless and until GECU can show a substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Further, Cumis objects to Request No. 27 as being overly broad. If GECU will designate with some particularity the documents it seeks, Cumis will consider same.

14. To the extent such documents are not privileged by the attorney-client privilege or were prepared in anticipation of litigation, Cumis will produce the items requested in Request No. 28.

15. Cumis objects to Requests No. 29, 30 and 31 for the reasons stated in Response No. 2 above. Further, Cumis would show that documents in its possession relating to other bond or policy claims are wholly irrelevant and immaterial to this case. Each claim is factually distinguishable. Whether a particular loss is within the scope of an insurance policy or bond is totally meaningless in regard to any other claim. Further, virtually all of the materials requested are confidential. Many of the materials requested are either privileged by the attorney-client privilege and not discoverable, or were prepared in anticipation of litigation and not discoverable without the appropriate showing.

16. Cumis will produce the documents requested in Request No. 32 in regard to the approval of the Bond and Policy forms in question in Texas.

17. Cumis objects to the breadth of Request No. 33. If GECU will designate with some particularity the documents for which it seeks production, Cumis will consider same.

18. Cumis will produce the documents requested in Request No. 34 in regard to the re-rating relevant to this lawsuit.

Respectfully submitted,

By: /s/ JAMES A. KNOX

James A. Knox
State Bar No. 11630000

By: /s/ STEPHEN L. BASKIND

Stephen L. Baskind
State Bar No. 01875600

VIAL, HAMILTON, KOCH,
TUBB, KNOX & STRADLEY
1500 Republic Bank Tower
Dallas, Texas 75201
(214) 748-4541

Attorneys for Plaintiff
Cumis Insurance Society, Inc.

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Answers to Government Employees Credit Union's First Request for Production of Documents to Cumis Insurance Society, Inc. has been forwarded to the following attorneys by Certified Mail, Return Receipt Requested on this 5th day of March, 1982.

Mr. Jerry Nugent
Mr. Robert C. Bass, Jr.
Rinehart & Nugent
1040 American Bank Tower
221 West Sixth Street
Austin, Texas 78701

Mr. Everette G. Allen, Jr.
Ms. Linda L. Royster
Hirschler, Fleischer, Weinberg,
Cox & Allen
629 East Main Street
P.O. Box 1Q
Richmond, Virginia 23202

Mr. Robert C. Howell
711 West 7th Street
Austin, Texas 78701

Mr. Lloyd Lochridge
Mr. James R. Raup
McGinnis, Lochridge & Kilgore
RepublicBank Austin Building
900 Congress Avenue
Austin, Texas 78701-2492

/s/ STEPHEN L. BASKIND
Stephen L. Baskind

Received May 10, 1982

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

Cumis Insurance Society, Inc.,)
 Plaintiff,)
 v.)
Government Employees Credit)
Union, Chester H. Dorman,)
Jerry M. Graybill, John T.)
Lancaster, R. N. Trapnell,)
Barbara J. Wood, J. T. Glass,)
Boone E. Kemp, O. L. Ponder,)
H. H. Willms, and)
Doris Dees Bolton,)
 Defendants.)

Civil Action No.
A-82-CA-13

**MOTION TO COMPEL DISCOVERY
UNDER RULE 37(a)
MOTION TO CONDUCT A
HEARING ON MOTION TO COMPEL DISCOVERY**

1. Pursuant to Rule 37(a), Federal Rules of Civil Procedure, Government Employees Credit Union, hereafter "GECU" moves for an order of this Court compelling Plaintiff CUMIS Insurance Society, Inc., hereafter "CUMIS", to make discovery.

2. GECU filed its First Request for Production of Documents to CUMIS Insurance Society, Inc. on February 1, 1982.

3. CUMIS in its response to said Request raised various general objections which it applies indiscriminately to Requests number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 29, 30, and 31.

4. CUMIS has raised other objections to GECU's Requests number 27, 28, 32, and 33 as well.

5. CUMIS' objections to producing the requested items do not satisfy CUMIS' burden in refusing to produce the requested documents, in that they are not properly based on any recognized doctrine or privilege which would impede the normal access of one party to another's documents.

6. GECU has prepared a Memorandum In Support Of Motion To Compel Discovery, attached hereto, specifying in detail the specious nature of CUMIS' objections to making discovery.

7. CUMIS has made discovery requests on GECU in this matter that are at least as broad and encompassing as those of GECU to which CUMIS has made objections; CUMIS' raising objections to GECU's request is an internal inconsistency of CUMIS' position which indicates the lack of merit in those objections.

8. GECU moves that, pursuant to Rule 14 of the Local Rules of the United States District Court for the Western District of Texas, the Court order a hearing be held on this Motion to Compel Discovery Under Rule 37(a).

Respectfully submitted,

RHINEHART & NUGENT
1000 American Bank Tower
Austin, Texas 78701
(512) 476-6527

By: /s/

Jerry Nugent
Bar Card No. 15132500

ATTORNEYS FOR GOVERNMENT
EMPLOYEES CREDIT UNION

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Motion To Compel Discovery Under Rule 37(a) was mailed, postage prepaid to Robert C. Howell, 711 West 7th St., Austin, Texas 78701; James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1550 RepublicBank Tower, Dallas, Texas 75201; Lloyd Lochridge and James A. Raup, McGinnis, Lochridge & Kilgore, RepublicBank Tower, 900 Congress, Austin, Texas 78701; Thomas Watkins, Higers, Watkins & Kazen, P.C., P.O. Box 2063, City National Bank Building, Austin, Texas 78768 and to John C. Wilson, Wilson & Grosenheider, 711 West Seventh Street, P.O. Box 1584, Austin, Texas 78767, this 6th day of May, 1982.

.....
Jerry Nugent

FILED

June 24, 1982

Charles W. Wagner, Clerk

By
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSIN DIVISION**

Cumis Insurance Society, Inc.,)
 Plaintiff,)
 vs.)
Government Employees Credit)
Union, Chester H. Dorman,)
Jerry M. Graybill, John T.)
Lancaster, R. N. Trapnell,)
Barbara J. Wood, J. T. Glass,)
Boone K. Kemp, O. L. Ponder,)
H. H. Willms, and)
Doris Dees Bolton,)
 Defendants.)

Civil Action No.
A-82-CA-13

**BRIEF IN RESPONSE TO GOVERNMENT EMPLOYEES
CREDIT UNION'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

CUMIS INSURANCE SOCIETY, INC. ("CUMIS"), Plaintiff and Respondent herein, files this its Brief in Response to Defendant Government Employees Credit Union's ("GECU") Motion to Compel Production of Documents and would show this Honorable Court the following:

I.

PREFACE

"Document production may be the discovery tool most susceptible to abuse..." *Issac v. Shell Oil*, 83 F.R.D. 428, 431 (S.D. Mich. 1979) Essentially, Defendant GECU has

requested and moved this Court to compel Plaintiff CUMIS to produce each and every document relating, in any way, to past or current Bond claims involving coverage questions between CUMIS and each of its insureds in regard to CUMIS' discovery Bond and Directors and Officers Policy. Such a Request could literally involve thousands of pages, most of which are absolutely irrelevant to the lawsuit and the issues at hand. The following brief sets forth the support for CUMIS' position which is stated in CUMIS' Response to GECU's Request filed on March 8, 1982.

II.

As pointed out in CUMIS' Response, CUMIS objects to GECU's Request Nos. 2 through 16, 29, 30 and 31 (See GECU's Request for Production of Documents) for the reason that such Requests are overbroad, burdensome, costly, related to documents which are principally irrelevant to this case, protected by the attorney-client privilege and directed toward materials prepared in anticipation of litigation. CUMIS objects to Request Nos. 27 and 28 on the grounds that they are protected from discovery pursuant to the attorney-client privilege. CUMIS objects to Request Nos. 27 and 28 on the grounds that they are overbroad. Finally, CUMIS objects to Request No. 27 on the ground that it seeks documents prepared in anticipation of litigation.

CUMIS has previously produced those documents requested to which no objection was filed.

A. Burdensome

As pointed out in *Alexander v. Rizzo*, 50 F.R.D. 379 (E.D. Pa. 1970), the fact that a request for production is burdensome and oppressive is a proper ground for objection. FED. R. CIV. P. 26(c) sets forth the well recognized and settled rule of law that a party to litigation should be protected from "annoyance, . . . or undue burden or expense." GECU, however, requests access to and review of virtually every claim ever filed which even remotely involved or involves coverages similar to the coverages in question herein. These

Requests, if enforced, would force CUMIS to examine every claim file in its possession, pull out all files which include discussions of the coverages in question and further classify all attorney-client and attorney work product materials contained therein. Such an exercise would be terribly time consuming, burdensome, expensive and of little value to GECU. See FED. R. CIV. P. 1 which declares that the Federal Rules of Civil Procedure shall be construed "to secure the just, speedy and inexpensive determination of every action." GECU's Request threatens CUMIS with considerable burden and expense and should not be enforced by this Court. See, *Issac v. Shell Oil Co.*, supra. An overly broad request for discovery which constitutes no more than a fishing expedition should not be permitted. See, *Sergan v. Dreyfus Corp.* 513 F.2d 695 (2nd Cir. 1975).

B. Irrelevant

Furthermore, as pointed out in FED. R. CIV. P. 26(b), only relevant matter is subject to discovery; that is, matter "relevant to the subject matter involved in the pending action." GECU's request to review virtually every file involving the coverages in question would embrace matters and documents which are, in large part, irrelevant to the subject matter of the pending litigation. That a particular claim involved in the interpretation of a portion of the Bond or Policy that may be involved here does not mean that such file will contain discoverable facts which will be relevant in this case. The interpretation of the coverages necessarily involves the circumstances and facts underlying the claim. An interpretation or construction of contractual language cannot be accomplished in a vacuum. Thus, any interpretation previously urged by CUMIS in a factually distinguishable claim is irrelevant to this dispute.

The fact that GECU's Requests may partially request relevant documents does not overcome CUMIS' objections to relevancy. GECU's Requests are similar to those involved in *Midland Investment Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 142 (S.D.N.Y. 1973) wherein the Court wrote:

Numbers 2, 5 to 11 are equally infirm. In each case some aspect of the subject of the request may be relevant and permissibly discoverable. In all cases, however, the request is far too broad and in fact in many cases the vast majority of documents called for would be irrelevant. The court cannot attempt to frame acceptable requests for counsel.

Likewise, GECU's Requests seek documents which are largely irrelevant to the instant lawsuit. As pointed out in 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURES, §2214 at 644 (1970) [hereinafter, "WRIGHT"], discovery may be refused as unduly burdensome when the information sought is only marginally relevant to the case. In *McCullough v. Dairy Queen*, 195. F. Supp. 918 (D.C. Pa. 1961), involving a motion by a licensee to require Plaintiffs to produce every contract ever made by them involving the right to use a freezer for which Plaintiffs owned the patent and every contract involving the use of a trade named owned by Plaintiffs, the Court denied the request as being manifestly burdensome, oppressive and unlimited in scope and calling for material largely irrelevant to the issue at bar. CUMIS would show that GECU's request is similarly burdensome, oppressive, unlimited in scope and largely irrelevant and, therefore, should be rejected.

CUMIS submits that discovery has limits and that these limits grow more formidable as the showing of relevancy and need diminishes. GECU's "need" for the information requested, if any, is slight and is unreasonable particularly when compared to the labor and expense required in complying with such.

C. Attorney-Client Privilege

Additionally, GECU requests, in part, production of communications between CUMIS and its lawyers which are clearly privileged. All jurisdictions and all rules of evidence uniformly recognize the protection which surrounds confi-

dential communications between attorney and client. See, McCORMICK ON EVIDENCE §§87-97 (1972). "Communications within the scope of the privilege are zealously protected." 8 WRIGHT at 134. Documents such as the items requested by GECU, which primarily involve giving legal guidance to a client, are privileged and not subject to discovery. See, *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35 (D.C.N.Y. 1973). Many of the files for which GECU seeks production contain communications between CUMIS and its lawyers. The files are voluminous and, thus, the burden of reviewing such files in order to delete such materials is great. As indicated above, where need and relevancy are questionable, the burden to the producing party should be weighed heavily before production is ordered. Here, CUMIS submits that the great burden of reviewing voluminous files to uncover privileged materials outweighs the need and questionable relevancy of the balance of the materials such that production should be denied.

D. Trial Preparation

The Requests seek production of virtually every CUMIS claim file, many of which involve matters that actually reach litigation. Thus, many of the documents in such files are trial preparation materials prepared by CUMIS' agents, representatives, lawyers or consultants. Further, although some claims never reach litigation, CUMIS prepares documents in anticipation of litigation frequently. (Matters may properly be characterized as prepared in anticipation of litigation regardless of whether a lawsuit is ultimately filed in connection therewith. See, 20B APPLEMAN, INSURANCE LAW & PRACTICE §12082 at 630 (1980).) The limited discovery of trial preparation materials extends to such materials prepared in anticipation of litigation other than the particular litigation in which production is sought. See, *U.S. v. Am. Tel. Co.*, 86 F.R.D. 603, 627 (D.C. 1979). These trial preparation documents are not discoverable under FED. R. CIV. P. 26(b) (3) unless GECU is able to demonstrate (i) a substantial need of the materials requested and

(ii) that it is unable to obtain the equivalent of the materials by other means without undue hardship. CUMIS submits that GECU does not, in fact, possess a *substantial* need for the materials requested and that such materials have almost no probative value or impact on the instant lawsuit.

Additionally, as provided in FED. R. CIV. P. 26(b) (3), "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories." The primary purpose of GECU's Requests is apparently to uncover attorneys' mental impressions, conclusions, opinions and/or legal theories regarding coverage questions in both active and closed claims and litigation. First, such opinions or impressions are neither relevant to this matter nor discoverable. Further, note that in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974, the Appellate Court ruled that such materials are "immune from discovery although the litigation in which it was developed has been terminated.")

Second, GECU is, in essence, seeking to discover the legal analysis applied to similar coverage questions in other claims by CUMIS' attorneys; such is nothing short of requesting review of attorneys' mental impressions, legal theories, opinions and the like. To require CUMIS to reveal the manner in which its lawyers construe a question which is wholly legal in nature is in full and complete contradiction to the admonition set forth in FED. R. CIV. P. 26(b) (3) and should not be permitted.

The question of coverage construction is principally one of law, not of fact. Discovery's function is to uncover facts. To ask CUMIS its prior interpretation of coverage questions as related to distinguishable claims is to request from CUMIS its interpretation of legal issues. Such is not within the scope of discovery and is not "reasonably calculated to lead to the discovery of admissible evidence. . . ." FED. R. CIV. P. 26(b) (1).

To the extent that GECU requests information contained in claim files which cannot be properly characterized as attorneys' mental impressions, opinions and the like, CUMIS submits that any documents falling outside the attorney work product classification would, for that very reason, be irrelevant to this case. In other words, the attorneys' mental impressions and conclusions concerning coverage questions provide the only information in the investigation and claim files which is even remotely relevant to this lawsuit. All other information contained in the files requested pertain to the particular facts of each individual claim and has absolutely no bearing on the matter at bar.

Further, much of the information contained in the requested claim files, to the extent that attorneys' mental impressions are not involved, is further protected from disclosure pursuant to the privilege in Texas afforded communications between an insured and his/her insurer. See, *Metroflight Inc. v. Argonaut Ins. Co.*, 403 F.Supp. 1195 (N.D. Tex. 1975), wherein the Court stated that the insured has a reasonable expectation of confidentiality and that insured and insurer communications are privileged with respect to the investigation of a claim. (*Metroflight* is particularly applicable to information directly passed between insured and insurer in regard to claims brought by third parties against an insured such as information communicated between a director and CUMIS' with respect to a claim within the Directors and Officers Policy). The investigation files are full of communications between insurer and insured which were intended to be kept confidential. CUMIS urges that it would be unreasonable and unjust to permit GECU to review confidential documents between insured and insurer, when virtually all of those communications are largely irrelevant to this case.

E. Overbroad

Typically, broad discovery requests such as GECU's are not enforced by the courts. In *Leumi Financial Corp v. Hartford Acc. & Indem. Co.*, 295 F.Supp. 539 (D.C.N.Y. 1969),

the Plaintiff bought (sic) a Banker's Blanket Bond action against its insurer which action involved the issue of the timeliness of notice of the claim. The insurer objected to interrogatories requiring the insurer to state how it handled claims on bonds similar to those involved therein from the time the bond was issued to the Plaintiff to five (5) months following the last transaction for which recovery was sought. Despite the fact that the insured limited its question in time, in contrast to GECU's request, the Court upheld the insurer's objection to the interrogatory stating: "[T]his court is loath to compel the Defendant to search through its files to compile what may prove to be useless information." 295 F.Supp. at 545.

III.

CUMIS urges, in the alternative, that if it be required to undergo the hardship and burden of searching through its inactive and active files and pulling out privileged or protective information and documents, GECU should be required to underwrite the cost of same. See, *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y. 1971) and *Waldron v. Cities Service Co.*, 361 F.2d 671 (2nd Cir. 1966), aff'd *1st National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), wherein the Courts agreed that a trial court has a duty to protect parties from excessive expense.

CUMIS asserts that the task of bringing together, examining and producing the requested documents could easily demand hundreds of man hours. In light of the fact that GECU's case is not dependent on this information and that these requests seem intended to annoy rather than to uncover relevant information, CUMIS requests that, in the alternative and without waiving any of the foregoing arguments, this Court place the financial burden of complying with these Requests on the party who asserts them.

WHEREFORE, PREMISES CONSIDERED, CUMIS requests that this Court deny GECU's Motion to Compel Production of Documents and, in the alternative and only if necessary, that GECU be required to recompense CUMIS

for the expenses of complying with said Request for Production.

Respectfully submitted,

By: /s/

JAMES A. KNOX
State Bar No. 11630000

By: /s/

STEPHEN L. BASKIND
State Bar No. 1875600

VIAL, HAMILTON, KOCH, TUBB,
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1500 RepublicBank Dallas Tower
Dallas, Texas 75201
(214) 748-4541

and

JOHN C. WILSON
WILSON & GROSENHEIDER
711 West Seventh Street
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(512) 478-1657

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing Brief in Response to Government Employees Credit Union's Motion To Compel Production of Documents has been forwarded via United States Postal Service, Certified Mail, Return Receipt Requested to:

**Mr. Everette G. Allen, Jr.
Ms. Linda Royster
Hirschler, Fleischer,
Weinberg, Cox & Allen
Post Office Box IQ
629 East Main Street
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**Mr. Lloyd Lochridge
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**Mr. Glen Wilkerson
Mr. John Coates
Clark, Thomas, Winters
& Shapiro
1200 Capital National Bank
Bldg.
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Austin, Texas 78767**

on this 23rd day of June, 1982.

**/s/
STEPHEN L. BASKIND**

FILED
August 9, 1982
Charles W. Wagner, Clerk
By
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

Cumis Insurance Society, Inc.,)	
<i>Plaintiff,</i>)	
vs.)	
Government Employees Credit)	
Union, Chester H. Dorman,)	
Jerry M. Graybill, John T.)	
Lancaster, R. N. Trapnell,)	A-82-CA-13
Barbara J. Wood, J. T. Glass,)	
Boone E. Kemp, O. L. Ponder,)	
H. L. Willms, and)	
Doris Dees Bolton,)	
<i>Defendants.</i>)	

ORDER

On this day came on to be considered the Plaintiff's and Defendants' Motions to Compel Discovery and Production of Documents. The Court having reviewed the Motions and Briefs of counsel is of the opinion that no privilege or reason exists to stay discovery for either party. The Court therefore, **ORDERS** that production of all documents by both parties commence immediately. The Court shall determine the admissibility at the time of trial.

It is further **ORDERED** that discovery shall cease November 10, 1982.

SIGNED and **ENTERED** this 4th day of August, 1982.

/s/
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OF WILLIAM J. LAUERMAN

**STATE OF WISCONSIN
COUNTY OF DANE**

}

BEFORE ME, the undersigned authority, on this day personally appeared WILLIAM J. LAUERMAN, known by me to be a credible person over the age of twenty-one (21) years and who, after being by me duly sworn, on his oath, deposed and stated as follows:

1. My name is WILLIAM J. LAUERMAN. I am the Manager of Bond and Corporate Claims of CUMIS INSURANCE SOCIETY, INC. ("CUMIS"). I have personal knowledge of all matters stated herein and am competent to testify thereon.

2. As part of my ordinary and regular duties with CUMIS, I am involved in the claim handling process. I am familiar with CUMIS' claim investigation procedures and CUMIS' system of record keeping. I am also familiar with the procedures and the filing and record keeping system of CUMIS as related to claims which result in litigation.

3. In its claim investigation procedures, CUMIS, on occasion, requests that in house corporate attorneys and outside attorneys submit opinion letters and memoranda as to certain legal aspects of claims, including coverage questions. These letters and memoranda are ordinarily maintained in claim or litigation files.

4. When a claim results in litigation, CUMIS ordinarily hires outside attorneys to represent it.

5. Based on my knowledge of claim and litigation files in CUMIS' possession, there are presently in excess of three thousand (3000) claims and litigation files which contain documents which refer to or relate to the CUMIS Credit Union Discovery Bond and the Directors and Officers Liability Policy. The three thousand (3000) files do not include underwriting or other files which may refer to such

Bond and Policy. These three thousand (3000) files were files created during the period 1978 through July of 1982. CUMIS normally maintains such files for five (5) years. Approximately eighty percent (80%) are located in Madison, Wisconsin and twenty percent (20%) are located in Pomona, California. These files contain hundreds of thousands of separate documents and perhaps over one million documents. The files contain correspondence and memoranda by and between CUMIS and its attorneys (both corporate and outside attorneys). These files also contain documents reflecting the mental impressions, conclusions, opinions and legal theories of CUMIS' attorneys (both corporate and outside attorneys) and of CUMIS' representatives and agents.

6. I have read the foregoing and swear on my personal knowledge that same is true and correct.

/s/

WILLIAM J. LAUERMAN

SUBSCRIBED AND SWORN TO BEFORE ME A
NOTARY PUBLIC on this the 9th day of September, 1982.

/s/

NOTARY PUBLIC

STATE OF WISCONSIN

My Commission is permanent.

.....

FILED

Charles W. Wagner, Clerk

By Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Cumis Insurance Society, Inc.)
Plaintiff,)
vs.)
Government Employees Credit)
Union, et al,)
Defendants.)

A-82-CA-13

ORDER COMPELLING PRODUCTION AND
PROTECTIVE ORDER

The Court enters the following order with regard to Discovery in this cause. Both parties shall make available for production all documents requested by discovery motions.

1. Any matter which either party considers confidential shall be designated and shall not be disclosed except in this proceeding and by further order of this Court.

2. Any matter which either party deems privileged shall be designated and submitted to the Court for in camera determination of any existing privilege.

3. Any matter which is clearly privileged, i.e. communications between attorney and client and work product of an attorney including documents prepared in anticipation of this litigation shall not be disclosed.

The Court enters the following revised schedule of discovery. All discovery will terminate January 21, 1983. A pre-trial order shall be filed by March 21, 1983.

SIGNED and ENTERED this 22nd day of September, 1982.

By: /s/ H. F. GARCIA

H. F. Garcia

United States District Judge

U.S. Court of Appeals

FILED

October 1, 1982

Gilbert E. Ganucheau

Clerk

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 82-1479

IN RE:

CUMIS INSURANCE SOCIETY, INC.,

Petitioner.

**On Petition for Writ of Mandamus to the United States
District Court for the Western District of Texas**

Before GEE, RANDALL and TATE, Circuit Judges.

BY THE COURT:

**IT IS ORDERED that the petition for writ of mandamus
is DENIED.**